MOTION FILED
APR 13 1981

Nos. 80-757, 80-895, 80-936

IN THE

Supreme Court of the United States

October Term, 1980

NEW YORK MERCANTILE EXCHANGE, RICHARD B. LEVINE, HOWARD GABLER and ALFRED PENNISI,
Petitioners,

—against—

NEIL LEIST, PHILIP SMITH and INCOMCO,
Respondents.

CLAYTON BROKERAGE CO. OF ST. LOUIS, INC.,
Petitioner,

—against—

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—against—

NATIONAL SUPER SPUDS, INC., *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Second Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC.

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MOTION OF NEW YORK STOCK EXCHANGE, INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE

New York Stock Exchange, Inc. (the "Exchange") moves pursuant to Rule 42 of the rules of this Court for leave to file the attached brief *amicus curiae* in support of the position of petitioner New York Mercantile Exchange that the decision below should be reversed because the majority erred in implying a private right of action for damages against commodities exchanges under Sections

5(d), 5a(8) and 9(b) of the Commodity Exchange Act ("CEA").

The Exchange is, and has been since October 1, 1934, registered with the Securities and Exchange Commission as a national securities exchange pursuant to Section 6 of the Securities Exchange Act of 1934 (the "Exchange Act"). The Exchange is the nation's largest securities exchange.

The Exchange Act and the CEA provide for comprehensive regulatory schemes under which private self-regulatory organizations function under the supervision of independent regulatory agencies. Neither the Exchange Act nor the CEA provides for private damage actions against exchanges. Both statutes were extensively amended in recent years—the Exchange Act in 1975 and the CEA in 1974—but no provision was added to either act authorizing private damage actions against exchanges. The legislative histories of both acts and their recent amendments provide no indication that Congress intended that there be private damage actions against exchanges. Nevertheless, some lower courts have implied, and continue to imply, private damage actions against exchanges on the basis of Congress' presumed intent while amending the statutes to adopt *sub silentio* the holdings of lower court cases then extant.

In its decision, the majority below relied on *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), which is the fountainhead for the theory that a private right of action against an exchange may be judicially implied under Section 6 of the Exchange Act. This Court, however, has never reviewed a decision implying a private right of action against an exchange under the Exchange Act or the CEA. Resolution of this issue will be important in determining the extent to which regulation of exchanges will be committed to the agencies charged by Congress with that responsibility or will be left to the vicissitudes of lower courts and juries. These cases also will determine whether *de novo* review of important ques-

tions as to the existence of implied private rights of action is foreclosed by lower court decisions followed by congressional silence when the statute is amended.

The Exchange is a defendant in two separate cases which present the question whether a private right of action for damages against a national securities exchange may be implied under Section 6 of the Exchange Act. *Rich v. New York Stock Exchange, Inc.*, Civil Action No. 73-4642 (PNL) (S.D.N.Y.); *Walck v. American Stock Exchange, Inc.*, Civil Action No. 77-140 (E.D. Pa) In the *Rich* case, the district court has denied a motion by the Exchange for judgment on the pleadings. *Rich v. New York Stock Exchange, Inc.*, [Current] Fed.Sec.L.Rep. (CCH) ¶ 97,856 (S.D.N.Y. Feb. 3, 1981). The Exchange argued in its motion that a private right of action may not be judicially implied under Section 6 of the Exchange Act. Upon consent of the parties, all proceedings in the *Rich* case have been stayed pending this Court's decision in the instant cases.

The Exchange has been unable to obtain the consent of all the parties to the filing of this brief *amicus curiae*. The Exchange therefore requests the Court's leave to file the attached brief *amicus curiae*.

Dated: April 9, 1981

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
INTEREST OF NEW YORK STOCK EXCHANGE, INC.	1
SUMMARY OF ARGUMENT	5
ARGUMENT	
I. THE COURT BELOW ERRED IN IMPLYING A PRIVATE RIGHT OF ACTION UNDER THE CEA BASED UPON THE PRESUMPTION THAT CONGRESS, IN AMENDING THE CEA IN 1974, WAS AWARE OF AND INTENDED TO ADOPT SUB SILENTIO LOWER COURT DECISIONS IMPLYING SUCH A PRIVATE RIGHT OF ACTION	6
A. The Relevant Language Of The CEA Does Not Support Implication Of A Private Right Of Action	7
B. The Majority's Construction Of The CEA, Premised On Congressional Silence, Was Improper	8
C. The Lower Court Decisions Relied Upon By The Majority Do Not Sustain The Decision Below	9
II. IMPLICATION OF A PRIVATE RIGHT OF ACTION AGAINST EXCHANGES IS INCONSISTENT WITH THE SCHEME OF SUPERVISED SELF-REGULATION WHICH CONGRESS INTENDED UNDER BOTH THE EXCHANGE ACT AND THE CEA	12
CONCLUSION	15
STATUTORY APPENDIX	
Section 6 of the Exchange Act, as enacted in 1934	A-1
Section 19 of the Exchange Act, as enacted in 1934	A-2
Section 6 of the Exchange Act, as amended by the Securities Acts Amendments of 1975	A-4
Section 19 of the Exchange Act, as amended by the Securities Acts Amendments of 1975	A-9

TABLE OF AUTHORITIES

PAGE

CASES

Baird v. Franklin, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944) ... 3, 4, 8, 10, 11, 12, 15
Cannon v. University of Chicago, 441 U.S. 677 (1979) ... 10, 15
Chicago Mercantile Exchange v. Deaktor, 414 U.S. 113 (1973) ... 13
Cort v. Ash, 422 U.S. 66 (1975) ... 7, 10
Far East Conference v. United States, 342 U.S. 570 (1952) ... 13
Gordon v. New York Stock Exchange, Inc., 422 U.S. 659 (1975) ... 13
J. I. Case Co. v. Borak, 377 U.S. 426 (1964) ... 11
Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980) ... 7, 8
Leist v. Simplot, 638 F.2d 283 (2d Cir. 1980) ... *passim*
Lenowitz v. Philadelphia Stock Exchange, Inc., 502 F. Supp. 428 (E.D. Pa. 1980) ... 4
Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117 (1973) ... 13
Ricci v. Chicago Mercantile Exchange, 409 U.S. 289 (1973) ... 13
Rich v. New York Stock Exchange, Inc., [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,856 (S.D.N.Y. Feb. 3, 1981) ... 4
SEC v. Sloan, 436 U.S. 103 (1978) ... 9, 11
Silver v. New York Stock Exchange, 373 U.S. 341 (1963) ... 13
T.I.M.E. Inc. v. United States, 359 U.S. 464 (1959) ... 8, 9
Touche Ross & Co. v. Redington, 442 U.S. 560 (1979) ... 4, 7, 8, 10, 11, 12
Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11 (1979) ... 4, 7, 8, 10
Universities Research Association, Inc. v. Coutu, No. 78-1945 (U.S. April 6, 1981) ... 14
Verace v. New York Stock Exchange, Inc., 478 F. Supp. 1061 (S.D.N.Y. 1979) ... 4

PAGE

STATUTES AND RULES

Commodity Exchange Act
- Section 2, 7 U.S.C. § 2 ---- 3
- Section 4f, 7 U.S.C. § 6f ---- 2
- Section 5, 7 U.S.C. § 7 ---- 2, 3, 5, 7
- Section 5a, 7 U.S.C. § a ---- 2, 3, 5, 7, 13
- Section 6, 7 U.S.C. § 8 ---- 3, 14
- Section 8a, 7 U.S.C. § 12 ---- 13
- Section 9, 7 U.S.C. § 13 ---- 3, 5, 7, 8
- Section 14, 7 U.S.C. § 18 ---- 3

Securities Act of 1933
- Section 17, 15 U.S.C. § 77q ---- 14

Securities Exchange Act of 1934
- Section 4, 15 U.S.C. § 78d ---- 3
- Section 6, 15 U.S.C. § 78f ---- 1, 2, 3, 4, 10, 11, 13
- Section 7, 15 U.S.C. § 78g ---- 14
- Section 9, 15 U.S.C. § 78i ---- 3
- Section 10, 15 U.S.C. § 78j ---- 4, 14
- Section 15, 15 U.S.C. § 78o ---- 2
- Section 16, 15 U.S.C. § 78p ---- 3
- Section 17, 15 U.S.C. § 78q ---- 7
- Section 18, 15 U.S.C. § 78r ---- 3
- Section 19, 15 U.S.C. § 78s ---- 2, 3, 13, 14
- Section 21, 15 U.S.C. § 78u ---- 3
- Section 25, 15 U.S.C. § 78y ---- 3
- Section 29, 15 U.S.C. § 78cc ---- 3
- Section 32, 15 U.S.C. § 78ff ---- 3

Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.* ---- 3

Regulation T, 12 C.F.R. § 220 ---- 14

OTHER AUTHORITIES

New York Stock Exchange Rules
- Rule 405 ---- 14
- Rule 431 ---- 14

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BRIEF AMICUS CURIAE OF NEW YORK STOCK EXCHANGE, INC.

INTEREST OF NEW YORK STOCK EXCHANGE, INC.

New York Stock Exchange, Inc. (the "Exchange") is a national securities exchange registered with the Securities and Exchange Commission pursuant to Section 6 of the Se-

curities Exchange Act of 1934* (the "Exchange Act"). The Exchange is a New York not-for-profit corporation. It has 1,366 members, most of whom are associated with one of the Exchange's 564 member organizations. As a self-regulatory organization under the Exchange Act, the Exchange is charged with supervisory and enforcement responsibilities over its members and member organizations, including their approximately 48,500 registered persons and 130,000 other employees. In carrying out its supervisory and enforcement responsibilities, the Exchange monitors approximately 80 per cent of all exchange-traded securities transactions in the United States.

The decision below** recognized the close similarities between the Exchange Act and the Commodity Exchange Act ("CEA"), including the corresponding roles played by petitioner New York Mercantile Exchange (the "NYME") and the Exchange. Both the Exchange Act and the CEA adopt a licensing procedure for the registration of exchanges (designated national securities exchanges and contract markets, respectively) upon the fulfillment of specified conditions. (Exchange Act § 6(b); CEA § 5(a)-(d)) Among these conditions are the requirements that exchanges enforce their rules (Exchange Act § 6(b)(1); CEA § 5a(8)), and that such rules provide for the prevention of fraudulent and manipulative practices. (Exchange Act § 6(b)(5); CEA § 5(d)) The Exchange Act and the CEA require the registration of traders (broker-dealers and futures commission merchants, respectively). (Exchange Act § 15; CEA § 4f) Both acts establish independent regulatory commissions (the SEC and the CFTC, respectively) with substantial powers of oversight of ex-

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* For the Court's convenience, Sections 6 and 19 of the Exchange Act as enacted in 1934 and as amended by the Securities Acts Amendments of 1975 are reproduced in the statutory appendix to this brief, *infra*.

** 638 F.2d 283.

changes (Exchange Act § 4(a); CEA § 2(a)(2)), including the power to approve or to disapprove exchange rules (Exchange Act § 19(b)*; CEA § 5a(12)), and the power to suspend or to revoke the license of an exchange. (Exchange Act § 19(h); CEA § 5(b)) The Exchange Act and the CEA expressly provide that the SEC and the CFTC may seek injunctive relief for violations of the statute. (Exchange Act § 21; CEA § 6(b)) Under both the Exchange Act and the CEA, judicial review of all orders of the SEC and the CFTC is lodged exclusively in the circuit courts of appeals. (Exchange Act § 25; CEA § 6(a), (b)) Both the Exchange Act and the CEA provide criminal penalties for price manipulation and for other statutory violations. (Exchange Act § 32; CEA § 9(b)) Finally, both statutes provide express, though limited, private civil remedies to persons aggrieved by particular statutory violations. (Exchange Act §§ 9, 16, 18, 29(b);** CEA § 14).

In *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944), the Court of Appeals for the Second Circuit held that a private right of action for damages may be implied against a national securities exchange for the exchange's alleged breach of duty under Section 6. *Baird* is cited by the majority below as a case of "special importance," which foreshadowed similar decisions under the CEA, because in *Baird* "the claim was of failure of the New York Stock Exchange to perform its duties—a claim paralleling that asserted here against NYME." 638 F.2d at 297.

Although a number of lower courts have followed *Baird*, this Court has never reviewed *Baird's* holding. The Ex-

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* See the statutory appendix to this brief for the text of Section 19 of the Exchange Act as enacted in 1934 and as amended by the Securities Acts Amendments of 1975.

** The Securities Investor Protection Act of 1970, 15 U.S.C. §§ 78aaa *et seq.*, provides additional investor protection when a broker-dealer is liquidated under the provisions of the Act.

change Act, and in particular Section 6, was extensively amended in 1975; however, Congress did not amend Section 6 to afford an express private right of action against exchanges nor did Congress, in the legislative history of the 1975 amendments, acknowledge the *Baird* holding or that any courts had legislated a private right of action under Section 6.

More recently, following this Court's decisions in *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979), and *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979), two lower courts have questioned whether a private right of action may be implied under Section 6 of the Exchange Act. *Verace v. New York Stock Exchange, Inc.*, 478 F. Supp. 1061 (S.D.N.Y. 1979); *Lenowitz v. Philadelphia Stock Exchange, Inc.*, 502 F. Supp. 428 (E.D. Pa. 1980). One lower court, however, noting the relative longevity of the *Baird* holding and citing this Court's eventual acquiescence (after 25 years) in the substantial and unanimous lower court treatment of Exchange Act § 10(b), and further persuaded by the rationale of the court below, has held that a private right of action may be implied against the Exchange under Section 6 of the Exchange Act. *Rich v. New York Stock Exchange, Inc.*, [Current] Fed. Sec. L. Rep. (CCH) ¶ 97,856 (S.D.N.Y. Feb. 3, 1981).

The Exchange necessarily is interested in this case because of the close parallels between the statutory schemes governing the Exchange and the NYME and the similarities between the arguments advanced to sustain a judicially-created damage action under each statutory scheme. The Court's decision in this case will have a significant impact upon the regulatory framework in which exchanges operate. It will also determine the extent to which lower court decisions that are clearly contrary to holdings of this Court are foreclosed from re-examination by reason of congressional silence at the time of enactment of subsequent statutory amendments.

SUMMARY OF ARGUMENT

The majority decision of the court of appeals erroneously held, *inter alia*, that a private right of action for damages against a commodities exchange may be implied under Sections 5(d), 5a(8), and 9(b) of the CEA. The majority's rationale—that pre-1974 lower court decisions implying private rights of action under the Exchange Act and the CEA, even though incorrectly decided and never reviewed by this Court, are controlling in determining congressional intent with respect to the 1974 CEA amendments—is contrary to recent decisions of this Court and is unsound. The decision of the majority runs counter to the unitary scheme of supervised self-regulation which Congress intended and which this Court has recognized under the Exchange Act and the CEA.

ARGUMENT

I.

The Court Below Erred In Implying A Private Right Of Action Under The CEA Based Upon The Presumption That Congress, In Amending The CEA In 1974, Was Aware Of And Intended To Adopt *Sub Silentio* Lower Court Decisions Implying Such A Private Right Of Action.

The majority of the court below stated the relevant issue to be whether Congress, when it amended the CEA in 1974, "intended *sub silentio* to alter the significance that had long been given these provisions by making other changes in the Act." *Leist v. Simplot,* 638 F.2d 283, 303 (2d Cir. 1980). Noting the existence of pre-1974 lower court decisions implying private rights of action under the CEA and the Exchange Act, and presuming that Congress was aware of these decisions and intended to adopt *sub silentio* their holdings, the majority concluded:

> The burden thus lies on those who urge that the 1974 amendments demonstrate an intention to change prior law . . . . When a principle has become settled through court decisions, there is no occasion for Congress to speak unless it wishes a change.

Id.

The majority's reasoning is seriously flawed. First, the majority practically ignored the language of the CEA, which should have been the starting point of its analysis. Second, the majority's presumption of congressional intent as a technique of statutory construction is inconsistent with this Court's recent decisions. Third, the pre-1974 lower court decisions implying private rights of action under the CEA and the Exchange Act, heavily relied upon by the majority, were incorrectly decided, and were never reviewed or otherwise affirmatively acknowledged by this Court. Furthermore, those lower court decisions were

not judicial interpretations of the Exchange Act and the CEA, but were judicial legislation creating tort actions to provide remedies perceived as necessary by some judges but not by Congress.

A. The Relevant Language Of The CEA Does Not Support Implication Of A Private Right Of Action.

This Court has repeatedly emphasized that the question whether a private right of action should be implied is solely a matter of congressional intent, and that to determine congressional intent analysis must begin with the language of the statute. *See, e.g., Cort v. Ash*, 422 U.S. 66 (1975); *Touche Ross & Co. v. Redington*, 422 U.S. 560 (1979); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11 (1979); *Kissinger v. Reporters Committee for Freedom of the Press*, 445 U.S. 136 (1980). However, the majority below fails even to quote the relevant statutory provisions governing commodities exchanges, stating that the "form" of the statute should not be an "obstacle" to the realization of Congress' presumed intent. 638 F.2d at 317.

The majority below held that a private right of action against commodities exchanges may be implied under Sections 5(d), 5a(8), and 9(b) of the CEA. Sections 5(d) and 5a(8), however, are essentially licensing statutes. These provisions merely require, as a condition of an exchange's designation as a "contract market," that the exchange provide for "the prevention of manipulation of prices and the cornering of any commodity" and that the exchange "[e]nforce all bylaws, rules, regulations, and resolutions, made or issued by it or by the governing board thereof . . . ." Sections 5(d) and 5a(8) of the CEA, like Section 17(a) of the Exchange Act considered in *Redington*, grant "no private rights to any identifiable class and [proscribe] no conduct as unlawful." 442 U.S. at 575-76.

Similarly, Section 9(b) of the CEA, like the statute this Court considered in *Cort v. Ash, supra*, is a bare criminal statute. Section 9(b) does not expressly provide

for any civil liability; rather it merely provides that it shall be a felony punishable by fine or imprisonment or both "for any person to manipulate . . . the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market or to corner . . . any such commodity." Like the statutory provisions this Court considered in *Redington, Transamerica,* and *Kissinger,* Section 9(b) merely "proscribes certain conduct" and does not "create or alter any civil liabilities." *Transamerica Mortgage Advisors, Inc. v. Lewis,* 444 U.S. at 19. Moreover, as Judge Mansfield's dissent below succinctly stated,

> [Section] 9(b) . . . does not disclose any desire to benefit a special class of which plaintiffs are members. When read in light of the Act's overall purposes it appears to have been enacted for the benefit of the public, including producers and consumers of commodities, not that of speculators or investors. . . . [T]here is not the slightest suggestion in the language or legislative history of § 9(b) that Congress impliedly intended it to be enforced by private civil suits for damages.

638 F.2d at 337-38.

B. The Majority's Construction Of The CEA, Premised On Congressional Silence, Was Improper.

The majority below reasoned that because Congress must have been aware of *Baird* and other lower court cases implying private rights against exchanges under the Exchange Act and the CEA, Congress in the 1974 CEA amendment process must be presumed to have considered the express grant of such a private right to be unnecessary. Such reasoning has been previously rejected by this Court. In *T.I.M.E. Inc. v. United States,* 359 U.S. 464 (1959), for example, the Court dismissed the argument that it should uphold a private right of action as the will of Congress

because of claimed congressional awareness of the private right and subsequent congressional inaction:

> We are told that Congress has long been aware that the Commission was of the view that a common-law action for recovery of unreasonable rates paid to a motor carrier, with referral to the Commission of the issue of unreasonableness, would lie, and that its failure to legislate in derogation of this view implies an approval and acceptance of it. But it appears that each time the Commission's views in this regard were communicated to committees of Congress, it was in connection with a request by the Commission for legislation which would have given to shippers a cause of action under the statute and granted to the Commission the authority to award reparations, and each time that request was rejected. . . . [W]e do not think that from the failure of Congress to grant a new authority any reliable inference can permissibly be drawn to the effect that any authority previously claimed was recognized and confirmed.

359 U.S. at 477-78. Similarly, this Court in *SEC v. Sloan*, 436 U.S. 103, 121 (1978), declined to impute to Congress acceptance of a supposedly long-standing administrative interpretation, noting that "we are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents."

C. The Lower Court Decisions Relied Upon By The Majority Do Not Sustain The Decision Below.

The majority relies upon pre-1974 lower court decisions purportedly interpreting the statutes to provide implied private rights of action against exchanges under the Exchange Act and the CEA. An examination of these decisions, however, demonstrates that the lower courts were not

interpreting the statutes but were supplementing them with judicially-created tort claims.

This is illustrated by the decision of the Court of Appeals for the Second Circuit in *Baird v. Franklin*, 141 F.2d 238 (2d Cir.), *cert. denied*, 323 U.S. 737 (1944). The majority opinion in *Baird* was written by Judge Augustus N. Hand. The majority, without analysis, held that the Exchange breached a duty by failing to take disciplinary action against a delinquent member-broker, but affirmed dismissal by the district court on the ground that the Exchange's breach of duty did not cause the plantiff's alleged damages. 141 F.2d at 239. In Judge Clark's separate opinion (dissenting on the issue of causation), which frequently is cited as expressing the rationale for the *Baird* decision, he articulated classic tort theory to imply a cause of action against the Exchange under Section 6 of the Exchange Act. 141 F.2d at 240-45. The majority below cited Judge Clark's opinion to support its conclusion that a private right of action may be implied against commodities exchanges under the CEA. 638 F.2d at 296-98.

Baird is irreconcilable with this Court's decisions in *Cort*, *Redington*, and *Transamerica*. *Baird* exemplifies a process, not of statutory construction, but of judicial legislation which has been expressly rejected by this Court.

Judge Clark said in *Baird*, relying upon tort rationale: "It is well established that members of a class for whose protection a statutory duty is created may sue for injuries resulting from its breach and that the common law will supply a remedy if the statute gives none." 141 F.2d at 245. This Court in *Touche Ross & Co. v. Redington*, *supra*, expressly rejected this tort rationale in the following terms: "As we recently have emphasized, 'the fact that a federal statute has been violated and some person harmed does not automatically give rise to a private right of action in favor of that person.'" 442 U.S. at 568, *quoting Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979).

Judge Clark in *Baird* also invoked the "necessity" for implying a private remedy. Otherwise, he said the legislation would be little more than "a snare and a delusion." 141 F.2d at 245. This Court in *Redington* rejected the "necessity" argument as irrelevant. The question is solely one of legislative intent where, as here, "the statute by its terms grants no private rights to any identifiable class and proscribes no conduct as unlawful." 442 U.S. at 576.

Judge Clark in *Baird* further relied on statutory "purpose." He noted that the Exchange Act contained thirty-seven references to protecting the public. 141 F.2d 244 n.4. Judge Clark observed: "[I]f the investing public is to be completely and effectively protected, § 6(b) must be construed as granting to injured investors individual causes of action to enforce the statutory duties imposed upon the exchanges." 141 F.2d at 244-45. This Court in *Redington* rejected this "remedial purposes" contention. The Court stated: "[G]eneralized references to the 'remedial purposes' of the 1934 Act will not justify reading a provision 'more broadly than its language and the statutory scheme reasonably permit . . . .'" 442 U.S. at 578, *quoting SEC v. Sloan*, 436 U.S. 103, 116 (1978). Moreover, this Court expressly declined to read *J. I. Case Co. v. Borak*, 377 U.S. 426 (1964), "so broadly that virtually every provision of the securities Acts gives rise to an implied private cause of action." 442 U.S. at 577.

Judge Clark in *Baird* declined to follow the established principle of statutory construction *"expressio unius est exclusio alterius."* 141 F.2d at 245. The Court in *Redington* adhered to this maxim. This Court stated: "[W]hen Congress wished to provide a private damages remedy [under the Exchange Act], it knew how to do so and did so expressly." 442 U.S. at 572.

Finally, Judge Clark in *Baird* did not examine statutory language or history for positive indications of legislative intent. This Court in *Redington* reaffirmed that affirmative

legislative intent is the fundamental basis upon which a private right of action is to be implied, and cautioned that "implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best." 442 U.S. at 571.

Baird and similar lower court decisions relied upon by the majority below are not authoritative statutory interpretations that should be presumed to have the sanction of Congress. Those decisions are based not upon the statute but upon a judicially perceived need to create a remedy for every wrong. The canon of construction cited by the majority below—that the reenactment of a statute incorporates preceding judicial interpretations—is inapplicable. The pre-1974 lower court decisions have no precedential value because the rationale that underlies them was erroneous and has been expressly rejected by this Court.

In the instant cases, given the absence of express statutory language or affirmative legislative history, and given the discredited rationale of the lower court cases relied upon by the majority below, this Court should reject the majority's effort to usurp the legislative process.

II

Implication Of A Private Right Of Action Against Exchanges Is Inconsistent With The Scheme Of Supervised Self-Regulation Which Congress Intended Under Both The Exchange Act And The CEA.

Both the Exchange Act and the CEA embody Congress' intent to establish and to promote a unified framework for control of securities exchanges and commodities exchanges by the SEC and the CFTC, respectively. See comparison of the Exchange Act and the CEA, *supra* at 2-3. District courts should not be permitted to interfere with the duties and liabilities of exchanges under these complex regulatory schemes. Congress has established specialized regulatory

agencies with express powers to define and to enforce exchanges' duties and liabilities, *cf. Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952), and has prescribed that judicial review should take place only after agency action, and then in the courts of appeals.

In *Silver v. New York Stock Exchange*, 373 U.S. 341, 352 (1963), this Court recognized that under the Exchange Act

> [t]he pattern of governmental entry . . . was by no means one of total displacement of the exchanges' traditional process of self-regulation. The intention was rather, as MR. JUSTICE DOUGLAS said, while Chairman of the S.E.C., one of "letting the exchanges take the leadership with Government [SEC] playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." Douglas, Democracy and Finance (Allen ed. 1940), 82.

See also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Ware, 414 U.S. 117, 127-28 (1973); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 663-67 (1975). The regulatory scheme established under the CEA is similar. *See Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289, 290-304 (1973); *Chicago Mercantile Exchange v. Deaktor*, 414 U.S. 113 (1973) *(per curiam)*.

Both the Exchange Act and the CEA were extensively amended in the mid-1970's. The purpose of these amendments was to ***strengthen*** governmental oversight of the exchange markets, but not, as the majority of the court below suggests (638 F.2d at 309), to replace or to eliminate the general concept of supervised self-regulation. In fact, the 1975 amendments to the Exchange Act (in particular, the amendments to Sections 6 and 19) and the 1974 amendments to the CEA (in particular CEA §§ 5a and 8a) expressly

retained the scheme of supervised self-regulation. The only significance of the recent amendments to the instant cases is that they demonstrate Congress' intent to make exchanges more accountable to the SEC and the CFTC rather than to private damage claimants in the district courts.

Implied private rights of action against exchanges are inconsistent with the comprehensive scheme of supervised self-regulation which Congress intended under both the Exchange Act and the CEA. Implied private rights of action against exchanges militate against uniformity of standards of exchange responsibility. Both the Exchange Act (Section 19(h)) and the CEA (Section 6(a)) expressly provide for SEC and CFTC oversight of exchange regulatory conduct. SEC and CFTC orders pursuant to this express authority are reviewable only in the courts of appeals. Implication of private rights of action against exchanges, superimposed on this existing statutory framework, effectively disperses the SEC's and the CFTC's oversight powers among the 91 district courts around the country. Inevitably, implication of such private rights of action results in differing judicial determinations as to standards of exchange responsibility, similar to the differing, judicially-created standards of broker-dealer responsibility which have evolved from private damage actions heretofore implied under Sections 7 and 10(b) of the Exchange Act, Section 17 of the Securities Act of 1933, Exchange Rules 405 and 431, and Regulation T of the Board of Governors of the Federal Reserve System.

Recently, in *Universities Research Association, Inc. v. Coutu*, No. 78-1945 (U.S. April 6, 1981), Mr. Justice Blackmun, speaking for a unanimous Court, rejected an attempt to imply a private right of action for damages under the Davis-Bacon Act on the ground, among others, that the unity and consistency intended to be established by the elaborate administrative scheme under the Act "would be short-lived if courts were free . . . to substitute [their] judgment for that of the contracting agency. . . ." That

analysis is equally applicable to the instant question whether private rights of action should be implied against exchanges.

Implication of private rights of action against exchanges interferes with the exchanges' regulatory functions under the Exchange Act and the CEA, and thereby frustrates "the underlying purpose of the legislative scheme." *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979). The prospect of facing huge, potentially unlimited, civil damage claims undoubtedly has an inhibiting effect on exchanges' regulatory actions. Surely, Congress did not intend that exchanges' vigorous enforcement of the Exchange Act and the CEA, and the many rules promulgated thereunder, should be compromised or diminished by the threat of potentially ruinous private damage claims.

CONCLUSION

The judgment of the court of appeals below should be reversed, and the tort theory of exchange liability espoused in *Baird* v. *Franklin, supra,* should be finally laid to rest.

Dated: April 9, 1981

Respectfully submitted,

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STATUTORY APPENDIX

A-1

Section 6 of the Exchange Act, as Enacted in 1934

(a) Any exchange may be registered with the Commission as a national securities exchange under the terms and conditions hereinafter provided in this section, by filing a registration statement in such form as the Commission may prescribe, containing the agreements, setting forth the information, and accompanied by the documents, below specified:

(1) An agreement (which shall not be construed as a waiver of any constitutional right or any right to contest the validity of any rule or regulation) to comply, and to enforce so far as is within its powers compliance by its members, with the provisions of this title, and any amendment thereto and any rule or regulation made or to be made thereunder;

(2) Such data as to its organization, rules of procedure, and membership, and such other information as the Commission may by rules and regulations require as being necessary or appropriate in the public interest or for the protection of investors;

(3) Copies of its constitution, articles of incorporation with all amendments thereto, and of its existing bylaws or rules or instruments corresponding thereto, whatever the name, which are hereinafter collectively referred to as the "rules of the exchange"; and

(4) An agreement to furnish to the Commission copies of any amendments to the rules of the exchange forthwith upon their adoption.

(b) No registration shall be granted or remain in force unless the rules of the exchange include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade, and declare that the willful violation of any provisions of this title or any rule or regulation thereunder shall be considered conduct or proceeding inconsistent with just and equitable principles of trade.

(c) Nothing in this title shall be construed to prevent any exchange from adopting and enforcing any rule not inconsistent with this title and the rules and regulations thereunder and the applicable laws of the State in which it is located.

(d) If it appears to the Commission that the exchange applying for registration is so organized as to be able to comply with the provisions of this title and the rules and regulations thereunder and that the rules of the exchange are just and adequate to insure fair dealing and to protect investors, the Commission shall cause such exchange to be registered as a national securities exchange.

(e) Within thirty days after the filing of the application, the Commission shall enter an order either granting or, after appropriate notice and opportunity for hearing, denying registration as a national securities exchange, unless the exchange applying for registration shall withdraw its application or consent to the Commission's deferring action on its application for a stated longer period after the date of filing. The filing with the Commission of an application for registration by an exchange shall be deemed to have taken place upon the receipt thereof. Amendments to an application may be made upon such terms as the Commission may prescribe.

(f) An exchange may, upon appropriate application in accordance with the rules and regulations of the Commission, and upon such terms as the Commission may deem necessary for the protection of investors, withdraw its registration.

Section 19 of the Exchange Act, as Enacted in 1934

(a) The Commission is authorized, if in its opinion such action is necessary or appropriate for the protection of investors—

(1) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to withdraw the registration of a national securities exchange if the Commission finds that such exchange has violated any provision of this title or of the rules and regulations thereunder or has failed to enforce, so far as is within its power, compliance therewith by a member or by an issuer of a security registered thereon.

(2) After appropriate notice and opportunity for hearing, by order to deny, to suspend the effective date of, to suspend for a period not exceeding twelve months, or to withdraw, the registration of a security if the Commission finds that the issuer of such security has failed to comply with any provision of this title or the rules and regulations thereunder.

(3) After appropriate notice and opportunity for hearing, by order to suspend for a period not exceeding twelve months or to expel from a national securities exchange any member or officer thereof whom the Commission finds has violated any provision of this title or the rules and regulations thereunder, or has effected any transaction for any other person who, he has reason to believe, is violating in respect of such transaction any provision of this title or the rules and regulations thereunder.

(4) And if in its opinion the public interest so requires, summarily to suspend trading in any registered security on any national securities exchange for a period not exceeding ten days, or with the approval of the President, summarily to suspend all trading on any national securities exchange for a period not exceeding ninety days.

(b) The Commission is further authorized, if after making appropriate request in writing to a national securities exchange that such exchange effect on its own behalf specified changes in its rules and practices, and after appropriate notice and opportunity for hearing, the Commission determines that such exchange has not made the changes so requested, and that such changes are necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange, by rules or regulations or by order to alter or supplement the rules of such exchange (insofar as necessary or appropriate to effect such changes) in respect of such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting businesses; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchange, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters.

(c) The Commission is authorized and directed to make a study and investigation of the rules of national securities exchanges with respect to the classification of members, the methods or election of officers and committees to insure a fair representation of the membership, and the suspension, expulsion, and disciplining of members of such exchanges. The Commission shall report to the Congress on or before January 3, 1935, the results of its investigation, together with its recommendations.

(d) The Commission is authorized and directed to make a study and investigation of the adequacy, for the protection of investors, of the rules of national securities exchanges and national securities associations, including rules for the expulsion, suspension, or disciplining of a member for conduct inconsistent with just and equitable principles of trade. The Commission shall report to the Congress on or before April 3, 1963, the results of its study and investigation, together with its recommendations, including such recommendations for legislation as it deems advisable. The Commission is authorized to appoint, without regard to the civil service laws, rules, and regulations, such personnel as the Commission deems advisable to carry out such study and investigation and to fix their respective rates of compensation without regard to the Classification Act of 1949, as amended, but no such rate shall exceed $18,500 per annum. To carry out such study and investigation there is hereby authorized to be appropriated the sum of $950,000.

(e)(1) The Commission is authorized and directed to make a study and investigation of the purchase, sale, and holding of securities by institutional investors of all types including, but not limited to, banks, insurance companies, mutual funds, employee pension and welfare funds, and foundation and college endowments, in order to determine the effect of such purchases, sales, and holdings upon (A) the maintenance of fair and orderly securities markets, (B) the stability of such markets, both in general and for individual securities, (C) the interests of the issuers of such securities, and (D) the interests of the public, in order that the Congress may determine what measures, if any, may be necessary and appropriate in the public interest and for the protection of investors. The Commission shall report to the Congress, on or before December 31, 1970, the results of its study and investigation, together with its recommendations, including such recommendations for legislation as it deems advisable.

(2) For the purposes of the study and investigation authorized by this subsection, the Commission shall have all the power and authority which it would have if such investigation were being conducted pursuant to section 21 of this Act. The Commission is authorized to appoint, without regard to the provisions of title 5, United States Code, governing appointments in the competitive service, and to pay, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates, such personnel as the Commission deems advisable to carry out the study and investigation authorized by this subsection, but no such rate shall exceed the per annum rate in effect for a GS-18.

(3) In connection with the study authorized by this subsection, the Commission shall consult with representatives of various classes of institutional investors, members of the securities industry, representatives of other Government agencies, and other interested persons. The Commission shall also consult with an advisory committee which it shall establish for the purpose of advising and consulting with the Commission on a regular basis on matters coming within the purview of such study.

(4) There is authorized to be appropriated not to exceed $945,000 for the study and investigation authorized by this subsection.

A-4

Section 6 of the Exchange Act, as Amended by the Securities Acts Amendments of 1975

(a) An exchange may be registered as a national securities exchange under the terms and conditions hereinafter provided in this section and in accordance with the provisions of section 19(a) of this title, by filing with the Commission an application for registration in such form as the Commission, by rule, may prescribe containing the rules of the exchange and such other information and documents as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) An exchange shall not be registered as a national securities exchange unless the Commission determines that—

(1) Such exchange is so organized and has the capacity to be able to carry out the purposes of this title and to comply, and (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) to enforce compliance by its members and persons associated with its members, with the provisions of this title, the rules and regulations thereunder, and the rules of the exchange.

(2) Subject to the provisions of subsection (c) of this section, the rules of the exchange provide that any registered broker or dealer or natural person asssociated with a registered broker or dealer may become a member of such exchange and any person may become associated with a member thereof.

(3) The rules of the exchange assure a fair representation of its members in the selection of its directors and administration of its affairs and provide that one or more directors shall be representative of issuers and investors and not be associated with a member of the exchange, broker, or dealer.

(4) The rules of the exchange provide for the equitable allocation of reasonable dues, fees, and other charges among its members and issuers and other persons using its facilities.

(5) The rules of the exchange are designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating, clearing, settling, processing information with respect to, and facilitating transactions in securities, to remove impediments to and perfect the mechanism of a free and open market and a national market system, and, in general, to protect investors and the public interest; and are not designed to permit unfair discrimination between customers, issuers, brokers, or dealers, or to regulate by virtue of any authority conferred by this title matters not related to the purposes of this title or the administration of the exchange.

(6) The rules of the exchange provide that (subject to any rule or order of the Commission pursuant to section 17(d) or 19(g)(2) of this title) its members and persons associated with its members shall be appropriately disciplined for violation of the provisions of this title, the rules or regulations thereunder, or the rules of the exchange, by expulsion, suspension, limitation of activties, functions, and operations, fine, censure, being suspended or barred from being associated with a member, or any other fitting sanction.

(7) The rules of the exchange are in accordance with the provisions of subsection (d) of this section, and, in general, provide a fair procedure for the disciplining of members and persons associated with members, the denial of membership to any person seeking membership therein, the barring of any person from becoming associated with a member thereof, and the prohibition or limitation by the exchange of any person with respect to access to services offered by the exchange or a member thereof.

(8) The rules of the exchange do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(c)(1) A national securities exchange shall deny membership to (A) any person, other than a natural person, which is not a registered broker or dealer or (B) any natural person who is not, or is not associated with, a registered broker or dealer.

(2) A national securities exchange may, and in cases in which the Commission, by order, directs as necessary or appropriate in the public interest or for the protection [of investors] shall, deny membership to any registered broker or dealer or natural person associated with a registered broker or dealer, and bar from becoming associated with a member any person, who is subject to a statutory disqualification. A national securities exchange shall file notice with the Commission not less than thirty days prior to admitting any person to membership or permitting any person to become associated with a member, if the exchange knew, or in the exercise of reasonable care should have known, that such person was subject to a statutory disqualification. The notice shall be in such form and contain such information as the Commission, by rule, may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(3)(A) A national securities exchange may deny membership to, or condition the membership of, a registered broker or dealer if (i) such broker or dealer does not meet such standards of financial responsibility or operational capability or such broker or dealer or any natural persons associated with such broker or dealer does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) such broker or dealer or person associated with such broker or dealer has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a member and the natural persons associated with such an applicant in accordance with procedures established by the rules of the exchange.

(B) A national securities exchange may bar a natural person from becoming a member or associated with a member, or condition the membership of a natural person or association of a natural person with a member, if such natural person (i) does not meet such standards of training, experience, and competence as are prescribed by the rules of the exchange or (ii) has engaged and there is a reasonable likelihood he will again engage in acts or practices inconsistent with just and equitable principles of trade. A national securities exchange may examine and verify the qualifications of an applicant to become a person associated with a member in accordance with procedures established by the rules of the exchange and require any person associated with a member, or any class of such persons, to be registered with the exchange in accordance with procedures so established.

(C) A national securities exchange may bar any person from becoming associated with a member if such person does not agree (i) to supply the exchange with such information with respect to its relationship and dealings with the member as may be specified in the rules of the exchange and (ii) to permit the examination of its books and records to verify the accuracy of any information so supplied.

(4) A national securities exchange may (A) limit the number of members of the exchange and (B) the number of members and designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker: Provided, however, That no national securities exchange shall have the authority to decrease the number of memberships in such exchange, or the number of members and designated representatives of members permitted to effect transactions on the floor of such exchange without the services of another person acting as broker, below such number in effect on May

1, 1975, or the date such exchange was registered with the Commission, whichever is later: And provided further, That the Commission, in accordance with the provisions of section 19(c) of this title, may amend the rules of any national securities exchange to increase (but not to decrease) or to remove any limitation on the number of memberships in such exchange or the number of members or designated representatives of members permitted to effect transactions on the floor of the exchange without the services of another person acting as broker, if the Commission finds that such limitation imposes a burden on competition not necessary or appropriate in furtherance of the purposes of this title.

(d)(1) In any proceeding by a national securities exchange to determine whether a member or person associated with a member should be disciplined (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall bring specific charges, notify such member or person of, and give him an opportunity to defend against, such charges, and keep a record. A determination by the exchange to impose a disciplinary sanction shall be supported by a statement setting forth—

(A) any act or practice in which such member or person associated with a member has been found to have engaged, or which such member or person has been found to have omitted;

(B) the specific provision of this title, the rules or regulations thereunder, or the rules of the exchange which any such act or practice, or omission to act, is deemed to violate; and

(C) the sanction imposed and the reasons therefor.

(2) In any proceeding by a national securities exchange to determine whether a person shall be denied membership, barred from becoming associated with a member, or prohibited or limited with respect to access to services offered by the exchange or a member thereof (other than a summary proceeding pursuant to paragraph (3) of this subsection), the exchange shall notify such person of, and give him an opportunity to be heard upon, the specific grounds for denial, bar, or prohibition or limitation under consideration and keep a record. A determination by the exchange to deny membership, bar a person from becoming associated with a member, or prohibit or limit a person with respect to access to services offered by the exchange or a member thereof shall be supported by a statement setting forth the specific grounds on which the denial, bar, or prohibition or limitation is based.

(3) A national securities exchange may summarily (A) suspend a member or person associated with a member who has been and is expelled or suspended from any self-regulatory organization or barred or suspended from being associated with a member of any self-regulatory organization, (B) suspend a member who is in such financial or operating difficulty that the exchange determines and so notifies the Commission that the member cannot be permitted to continue to do business as a member with safety to investors, creditors, other members, or the exchange, or (C) limit or prohibit any person with respect to access to services offered by the exchange if subparagraph (A) or (B) of this paragraph is applicable to such person or, in the case of a person who is not a member, if the exchange determines that such person does not meet the qualification requirements or other prerequisites for such access and such person cannot be permitted to continue to have such access with safety to investors, creditors, members, or the exchange. Any person aggrieved by any such summary action shall be promptly afforded an opportunity for a hearing by the exchange in accordance with the provisions of paragraph (1) or (2) of this subsection. The Commission, by order, may stay any such summary action on its own motion or upon application by any person aggrieved thereby, if the Commission determines summarily or after notice and opportunity for hearing (which hearing may consist solely of the submission of affidavits or presentation of oral arguments) that such stay is consistent with the public interest and the protection of investors.

(c)(1) On and after the date of enactment of the Securities Acts Amendments of 1975, no national securities exchange may impose any schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members: Provided, however, That until May 1, 1976, the preceding provisions of this paragraph shall not prohibit any such exchange from imposing or fixing any schedule of commissions, allowances, discounts, or other fees to be charged by its members for acting as broker on the floor of the exchange or as odd-lot dealer: And provided further, That the Commission, in accordance with the provisions of section 19(b) of this title as modified by the provisions of paragraph (4) of this section, may—

(A) permit a national securities exchange, by rule, to impose a reasonable schedule or fix reasonable rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange prior to November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees are in the public interest; and

(B) permit a national securities exchange, by rule, to impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange after November 1, 1976, if the Commission finds that such schedule or fixed rates of commissions, allowances, discounts, or other fees (i) are reasonable in relation to the costs of providing the service for which such fees are charged (and the Commission publishes the standards employed in adjudging reasonableness) and (ii) do not impose any burden on competition not necessary or appropriate in furtherance of the purposes of this title, taking into consideration the competitive effects of permitting such schedule or fixed rates weighed against the competitive effects of other lawful actions which the Commission is authorized to take under this title.

(2) Notwithstanding the provisions of section 19(c) of this title, the Commission, by rule, may abrogate any exchange rule which imposes a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Commission determines that such schedule or fixed rates are no longer reasonable, in the public interest, or necessary to accomplish the purposes of this title.

(3) Until December 31, 1976, the Commission, on a regular basis, shall file with the Speaker of the House and the President of the Senate information concerning the effect on the public interest, protection of investors, and maintenance of fair and orderly markets of the absence of any schedule or fixed rates of commissions, allowances, discounts, or other fees to be charged by members of any national securities exchange for effecting transactions on such exchange.

(4)(A) Before approving or disapproving any proposed rule change submitted by a national securities exchange which would impose a schedule or fix rates of commissions, allowances, discounts, or other fees to be charged by its members for effecting transactions on such exchange, the Commission shall afford interested persons (i) an opportunity for oral presentation of data, views, and arguments and (ii) with respect to any such rule concerning transactions effected after November 1, 1976, if the Commission determines there are disputed issues of material fact, to present such rebuttal submissions and to conduct (or have conducted under subparagraph (B) of this paragraph) such cross-examination as the Commission determines to be appropriate and required for full disclosure and proper resolution of such disputed issues of material fact.

(B) The Commission shall prescribe rules and make rulings concerning any proceeding in accordance with subparagraph (A) of this paragraph designed to avoid unnecessary costs or delay. Such rules or rulings may (i) impose reasonable time limits on each interested person's oral presentations, and (ii) require any cross-examination to which a person may be entitled under sub-

paragraph (A) of this paragraph to be conducted by the Commission on behalf of that person in such manner as the Commission determines to be appropriate and required for full disclosure and proper resolution of disputed issues of material fact.

(C)(i) If any class of persons, the members of which are entitled to conduct (or have conducted) cross-examination under subparagraphs (A) and (B) of this paragraph and which have, in the view of the Commission, the same or similar interests in the proceeding, cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings specifying the manner in which such interests shall be represented and such cross-examination conducted.

(ii) No member of any class of persons with respect to which the Commission has specified the manner in which its interests shall be represented pursuant to clause (i) of this subparagraph shall be denied, pursuant to such clause (i), the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation and there are substantial and relevant issues which would not be presented adequately by group representation.

(D) A transcript shall be kept of any oral presentation and cross-examination.

(E) In addition to the bases specified in subsection 25(a), a reviewing Court may set aside an order of the Commission under section 19(b) approving an exchange rule imposing a schedule or fixes rates of commissions, allowances, discounts, or other fees, if the Court finds—

(1) a Commission determination under paragraph (4)(A) that an interested person is not entitled to conduct cross-examination or make rebuttal submissions, or

(2) a Commission rule or ruling under paragraph (4)(B) limiting the petitioner's cross-examination or rebuttal submissions,

has precluded full disclosure and proper resolution of disputed issues of material fact which were necessary for fair determination by the Commission.

(f) The Commission, by rule or order, as it deems necessary or appropriate in the public interest and for the protection of investors, to maintain fair and orderly markets, or to assure equal regulation, may require—

(1) any person not a member or a designated representative of a member of a national securities exchange effecting transactions on such exchange without the services of another person acting as a broker, or

(2) any broker or dealer not a member of a national securities exchange effecting transactions on such exchange on a regular basis,

to comply with such rules of such exchange as the Commission may specify.

SECTION 19 OF THE EXCHANGE ACT, AS AMENDED BY THE SECURITIES ACTS AMENDMENTS OF 1975

(a)(1) The Commission shall, upon the filing of an application for registration as a national securities exchange, registered securities association, or registered clearing agency, pursuant to section 6, 15A or 17A of this title, respectively, publish notice of the filing and afford interested persons an opportunity to submit written data, views, and arguments concerning such application. Within ninety days of the date of publication of such notice (or within such longer period as to which the applicant consents), the Commission shall—

(A) by order grant such registration, or

(B) institute proceedings to determine whether registration should be denied. Such proceedings shall include notice of the grounds for denial under consideration and opportunity for hearing and shall be concluded within one hundred eighty days of the date of publication of notice of the filing of the application for registration. At the conclusion of such proceedings the Commission, by order, shall grant or deny such registration. The Commission may extend the time for conclusion of such proceedings for up to ninety days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the applicant consents.

The Commission shall grant such registration if it finds that the requirements of this title and the rules and regulations thereunder with respect to the applicant are satisfied. The Commission shall deny such registration if it does not make such finding.

(2) With respect to an application for registration filed by a clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not grant registration prior to the sixtieth day after the date of publication of notice of the filing of such application unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that such clearing agency is so organized and has the capacity to be able to safeguard securities and funds in its custody or control or for which it is responsible and that the rules of such clearing agency are designed to assure the safeguarding of such securities and funds.

(B) The Commission shall institute proceedings in accordance with paragraph (1)(B) of this subsection to determine whether registration should be denied if the appropriate regulatory agency for such clearing agency notifies the Commission within sixty days of the date of publication of notice of the filing of such application of such appropriate regulatory agency's (i) determination that such clearing agency may not be so organized or have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency may not be designed to assure the safeguarding of such securities and funds and (ii) reasons for such determination.

(C) The Commission shall deny registration if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (1)(B) of this subsection of such appropriate regulatory agency's (i) determination that such clearing agency is not so organized or does not have the capacity to be able to safeguard securities or funds in its custody or control or for which it is responsible or that the rules of such clearing agency are not designed to assure the safeguarding of such securities or funds and (ii) reasons for such determination.

(3) A self-regulatory organization may, upon such terms and conditions as the Commission, by rule, deems necessary or appropriate in the public interest or for the protection of investors, withdraw from registration by filing a written notice of withdrawal with the Commission. If the Commission finds that any self-regulatory organization is no longer in existence or has ceased to do business in the capacity specified in its application for registration, the Commission, by order, shall cancel its registration. Upon the withdrawal of a national securities association from registration or the cancellation, suspension, or revocation of the registration of a national securities association, the registration of any association affiliated therewith shall automatically terminate.

(b)(1) Each self-regulatory organization shall file with the Commission, in accordance with such rules as the Commission may prescribe, copies of any proposed rule or any proposed change in, addition to, or deletion from the rules of such self-regulatory organization (hereinafter in this subsection collectively referred to as a "proposed rule change") accompanied by a concise general statement of the basis and purpose of such proposed rule change. The Commission shall, upon the filing of any proposed rule change, publish notice thereof together with the terms of substance of the proposed rule change or a description of the subjects and issues involved. The Commission shall give interested persons an opportunity to submit written data, views, and arguments concerning such proposed rule change. No proposed rule change shall take effect unless approved by the Commission or otherwise permitted in accordance with the provisions of this subsection.

(2) Within thirty-five days of the date of publication of notice of the filing of a proposed rule change in accordance with paragraph (1) of this subsection, or within such longer period as the Commission may designate up to ninety days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or as to which the self-regulatory organization consents, the Commission shall—

(A) by order approve such proposed rule change, or

(B) institute proceedings to determine whether the proposed rule change should be disapproved. Such proceedings shall include notice of the grounds for disapproval under consideration and opportunity for hearing and be concluded within one hundred eighty days of the date of publication of notice of the filing of the proposed rule change. At the conclusion of such proceedings the Commission, by order, shall approve or disapprove such proposed rule change. The Commission may extend the time for conclusion of such proceedings for up to sixty days if it finds good cause for such extension and publishes its reasons for so finding or for such longer period as to which the self-regulatory organization consents.

The Commission shall approve a proposed rule change of a self-regulatory organization if it finds that such proposed rule change is consistent with the requirements of this title and the rules and regulations thereunder applicable to such organization. The Commission shall disapprove a proposed rule change of a self-regulatory organization if it does not make such finding. The Commission shall not approve any proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof, unless the Commission finds good cause for so doing and publishes its reasons for so finding.

(3)(A) Notwithstanding the provisions of paragraph (2) of this subsection, a proposed rule change may take effect upon filing with the Commission if designated by the self-regulatory organization as (i) constituting a stated policy, practice, or interpretation with respect to the meaning, administration, or enforcement of an existing rule of the self-regulatory organization, (ii) establishing or changing a due, fee, or other charge imposed by the self-regulatory organization, or (iii) concerned solely with the administration of the self-regulatory organization or other matters which the Commission, by rule, consistent with the public interest and the purposes of this subsection, may specify as without the provisions of such paragraph (2).

(B) Notwithstanding any other provision of this subsection, a proposed rule change may be put into effect summarily if it appears to the Commission that such action is necessary for the protection of investors, the maintenance of fair and orderly markets, or the safeguarding of securities or funds. Any proposed rule change so put into effect shall be filed promptly thereafter in accordance with the provisions of paragraph (1) of this subsection.

(C) Any proposed rule change of a self-regulatory organization which has taken effect pursuant to subparagraph (A) or (B) of this paragraph may be enforced by such organization to the extent it is not inconsistent with the provisions of this title, the rules and regulations thereunder, and applicable Federal and State law. At any time within sixty days of the date of filing of such a proposed rule change in accordance with the provisions of paragraph (1) of this subsection, the Commission summarily may abrogate the change in the rules of the self-regulatory organization made thereby and require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection and reviewed in accordance with the provisions of paragraph (2) of this subsection, if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title. Commission action pursuant to the preceding sentence shall not affect the validity or force of the rule change during the period it was in effect and shall not be reviewable under section 25 of this title nor deemed to be "final agency action" for purposes of section 704 of title 5, United States Code.

(4) With respect to a proposed rule change filed by a registered clearing agency for which the Commission is not the appropriate regulatory agency—

(A) The Commission shall not approve any such proposed rule change prior to the thirtieth day after the date of publication of notice of the filing thereof unless the appropriate regulatory agency for such clearing agency has notified the Commission of such appropriate regulatory agency's determination that the proposed rule change is consistent with the safeguarding of securities and funds in the custody or control of such clearing agency or for which it is responsible.

(B) The Commission shall institute proceedings in accordance with paragraph (2)(B) of this subsection to determine whether any such proposed rule change should be disapproved, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of publication of notice of the filing of the proposed rule change of such appropriate regulatory agency's (i) determination that the proposed rule change may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(C) The Commission shall disapprove any such proposed rule change if the appropriate regulatory agency for such clearing agency notifies the Commission prior to the conclusion of proceedings instituted in accordance with paragraph (2)(B) of this subsection of such appropriate regulatory agency's (i) determination that the proposed rule change is inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(D) The Commission shall abrogate any change in the rules of such a clearing agency made by a proposed rule change which has taken effect pursuant to paragraph (3) of this subsection, require that the proposed rule change be refiled in accordance with the provisions of paragraph (1) of this subsection, and reviewed in accordance with the provisions of paragraph (2) of this subsection, if the appropriate regulatory agency for such clearing agency notifies the Commission within thirty days of the date of filing of such proposed rule change of such appropriate regulatory agency's (i) determination that the rules of such clearing agency as so changed may be inconsistent with the safeguarding of securities or funds in the custody or control of such clearing agency or for which it is responsible and (ii) reasons for such determination.

(c) The Commission, by rule, may abrogate, add to, and delete from (hereinafter in this subsection collectively referred to as "amend") the rules of a self-regulatory organization (other than a registered clearing agency) as the Commission deems necessary or appropriate to insure the fair administration of the self-regulatory organization, to conform its rules to requirements of this title and the rules and regulations thereunder applicable to such organization, or otherwise in furtherance of the purposes of this title, in the following manner:

(1) The Commission shall notify the self-regulatory organization and publish notice of the proposed rulemaking in the Federal Register. The notice shall include the text of the proposed amendment to the rules of the self-regulatory organization and a statement of the Commission's reasons, including any pertinent facts, for commencing such proposed rulemaking.

(2) The Commission shall give interested persons an opportunity for the oral presentation of data, views, and arguments, in addition to an opportunity to make written submissions. A transcript shall be kept of any oral presentation.

(3) A rule adopted pursuant to this subsection shall incorporate the text of the amendment to the rules of the self-regulatory organization and a statement of the Commission's basis for and purpose in so amending such rules. This statement shall include an identification of any facts on which the Commission considers its determination so to amend the rules of the self-regulatory agency to be based, including the reasons for the Commission's conclusions as to any of such facts which were disputed in the rulemaking.

(4)(A) Except as provided in paragraphs (1) through (3) of this subsection, rulemaking under this subsection shall be in accordance with the procedures specified in section 553 of title 5, United States Code, for rulemaking not on the record.

(B) Nothing in this subsection shall be construed to impair or limit the Commission's power to make, or to modify or alter the procedures the Commission may follow in making rules and regulations pursuant to any other authority under this title.

(C) Any amendment to the rules of a self-regulatory organization made by the Commission pursuant to this subsection shall be considered for all purposes of this title to be part of the rules of such self-regulatory organization and shall not be considered to be a rule of the Commission.

(d)(1) If any self-regulatory organization imposes any final disciplinary sanction on any member thereof or participant therein, denies membership or participation to any applicant, or prohibits or limits any person in respect to access to services offered by such organization or member thereof or if any self-regulatory organization (other than a registered clearing agency) imposes any final disciplinary sanction on any person associated with a member, or bars any person from becoming associated with a member, the self-regulatory organization shall promptly file notice thereof with the appropriate regulatory agency for the self-regulatory organization and (if other than the appropriate regulatory agency for the self-regulatory organization) the appropriate regulatory agency for such member, participant, applicant, or other person. The notice shall be in such form and contain such information as the appropriate regulatory agency for the self-regulatory organization, by rule, may prescribe as necessary or appropriate in furtherance of the purposes of this title.

(2) Any action with respect to which a self-regulatory organization is required by paragraph (1) of this subsection to file notice shall be subject to review by the appropriate regulatory agency for such member, participant, applicant, or other person, on its own motion, or upon application by any person aggrieved thereby filed within thirty days after the date such notice was filed with such appropriate regulatory agency and received by such aggrieved person, or within such longer period as such appropriate regulatory agency may determine. Application to such appro-

priate regulatory agency for review, or the institution of review by such appropriate regulatory agency on its own motion, shall not operate as a stay of such action unless such appropriate regulatory agency otherwise orders, summarily or after notice and opportunity for hearing on the question of a stay (which hearing may consist solely of the submission of affidavits or presentation of oral arguments). Each appropriate regulatory agency shall establish for appropriate cases an expedited procedure for consideration and determination of the question of a stay.

(e)(1) In any proceeding to review a final disciplinary sanction imposed by a self-regulatory organization on a member thereof or participant therein or a person associated with such a member, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to affirm, modify, or set aside the sanction)—

(A) if the appropriate regulatory agency for such member, participant, or person associated with a member finds that such member, participant, or person associated with a member has engaged in such acts or practices, or has omitted such acts, as the self-regulatory organization has found him to have engaged in or omitted, that such acts or practices, or omissions to act, are in violation of such provisions of this title, the rules or regulations thereunder, the rules of the self-regulatory organization, or, in the case of a registered securities association, the rules of the Municipal Securities Rulemaking Board as have been specified in the determination of the self-regulatory organization, and that such provisions are, and were applied in a manner, consistent with the purposes of this title, such appropriate regulatory agency, by order, shall so declare and, as appropriate, affirm the sanction imposed by the self-regulatory organization, modify the sanction in accordance with paragraph (2) of this subsection, or remand to the self-regulatory organization for further proceedings; or

(B) if such appropriate regulatory agency does not make any such finding it shall, by order, set aside the sanction imposed by the self-regulatory organization and, if appropriate, remand to the self-regulatory organization for further proceedings.

(2) If the appropriate regulatory agency for a member, participant, or person associated with a member, having due regard for the public interest and the protection of investors, finds after a proceeding in accordance with paragraph (1) of this subsection that a sanction imposed by a self-regulatory organization upon such member, participant, or person associated with a member imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title or is excessive or oppressive, the appropriate regulatory agency may cancel, reduce, or require the remission of such sanction.

(f) In any proceeding to review the denial of membership or participation in a self-regulatory organization to any applicant, the barring of any person from becoming associated with a member of a self-regulatory organization, or the prohibition or limitation by a self-regulatory organization of any person with respect to access to services offered by the self-regulatory organization or any member thereof, if the appropriate regulatory agency for such applicant or person, after notice and opportunity for hearing (which hearing may consist solely of consideration of the record before the self-regulatory organization and opportunity for the presentation of supporting reasons to dismiss the proceeding or set aside the action of the self-regulatory organization) finds that the specific grounds on which such denial, bar, or prohibition or limitation is based exist in fact, that such denial, bar, or prohibition or limitation is in accordance with the rules of the self-regulatory organization, and that such rules are, and were applied in a manner consistent with the purposes of this

title, such appropriate regulatory agency, by order, shall dismiss the proceeding. If such appropriate regulatory agency does not make any such finding or if it finds that such denial, bar, or prohibition or limitation imposes any burden on competition not necessary or appropriate in furtherance of the purposes of this title, such appropriate regulatory agency, by order, shall set aside the action of the self-regulatory organization and require it to admit such applicant to membership or participation, permit such person to become associated with a member, or grant such person access to services offered by the self-regulatory organization or member thereof.

(g)(1) Every self-regulatory organization shall comply with the provisions of this title, the rules and regulations thereunder, and its own rules, and (subject to the provisions of section 17(d) of this title, paragraph (2) of this subsection, and the rules thereunder) absent reasonable justification or excuse enforce compliance—

(A) in the case of a national securities exchange, with such provisions by its members and persons associated with its members;

(B) in the case of a registered securities association, with such provisions and the provisions of the rules of the Municipal Securities Rulemaking Board by its members and persons associated with its members; and

(C) in the case of a registered clearing agency, with its own rules by its participants.

(2) The Commission, by rule, consistent with the public interest, the protection of investors, and the other purposes of this title, may relieve any self-regulatory organization of any responsibility under this title to enforce compliance with any specified provision of this title or the rules or regulations thereunder by any member of such organization or person associated with such a member, or any class of such members or persons associated with a member.

(h)(1) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or revoke the registration of such self-regulatory organization, or to censure or impose limitations upon the activities, functions, and operations of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such self-regulatory organization has violated or is unable to comply with any provision of this title, the rules or regulations thereunder, or its own rules or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by a member thereof or a person associated with a member thereof;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by a member thereof or a person associated with a member thereof; or

(C) in the case of a registered clearing agency, with any provision of its own rules by a participant therein.

(2) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or expel from such self-regulatory organization any member thereof or participant therein, if such member or participant is subject to an order of the Commission pursuant to section 15(b)(4) of this title or if such appropriate regulatory agency

finds, on the record after notice and opportunity for hearing, that such member or participant has willfully violated or has effected any transaction for any other person who, such member or participant had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes;

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of such statutes, or the rules of the Municipal Securities Rulemaking Board; or

(C) in the case of a registered clearing agency, any provision of the rules of the clearing agency.

(3) The appropriate regulatory agency for a national securities exchange or registered securities association is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to suspend for a period not exceeding twelve months or to bar any person from being associated with a member of such national securities exchange or registered securities association, if such person is subject to an order of the Commission pursuant to section 15(b)(6) or if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such person has willfully violated or has effected any transaction for any other person who, such person associated with a member had reason to believe, was violating with respect to such transaction—

(A) in the case of a national securities exchange, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, or the rules or regulations under any of such statutes; or

(B) in the case of a registered securities association, any provision of the Securities Act of 1933, the Investment Advisers Act of 1940, the Investment Company Act of 1940, this title, the rules or regulations under any of the statutes, or the rules of the Municipal Securities Rulemaking Board.

(4) The appropriate regulatory agency for a self-regulatory organization is authorized, by order, if in its opinion such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of this title, to remove from office or censure any officer or director of such self-regulatory organization, if such appropriate regulatory agency finds, on the record after notice and opportunity for hearing, that such officer or director has willfully violated any provision of this title, the rules or regulations thereunder, or the rules of such self-regulatory organization, willfully abused his authority, or without reasonable justification or excuse has failed to enforce compliance—

(A) in the case of a national securities exchange, with any such provision by any member or person associated with a member;

(B) in the case of a registered securities association, with any such provision or any provision of the rules of the Municipal Securities Rulemaking Board by any member or person associated with a member; or

(C) in the case of a registered clearing agency, with any provision of the rules of the clearing agency by any participant.

(i) If a proceeding under subsection (h)(1) of this section results in the suspension or revocation of the registration of a clearing agency, the appropriate regulatory agency for such clearing agency may, upon notice to such clearing agency, apply to any court of competent jurisdiction specified in section 21(d) or 27 of this title for the appointment of a trustee. In the event of such an application, the court may, to the extent it deems necessary or appropriate, take exclusive jurisdiction of such clearing agency and the records and assets thereof, wherever located; and the court shall appoint the appropriate regulatory agency for such clearing agency or a person designated by such appropriate regulatory agency as trustee with power to take possession and continue to operate or terminate the operations of such clearing agency in an orderly manner for the protection of participants and investors, subject to such terms and conditions as the court may prescribe.